

**MINUTES FOR THE BOARD OF ADJUSTMENT MEETING**

June 28, 2013

I. **ATTENDANCE** - The Chair called the meeting to order at 1:30 p.m. in the Council Chambers, 200 East Main Street, on June 28, 2013. Members present were Barry Stumbo, Chair; Noel White, Kathryn Moore (departed at 2:45 p.m.), Joseph Smith, James Griggs and Thomas Glover. Janice Meyer was absent. Others present were Chuck Saylor, Division of Engineering; Jeff Neal, Division of Traffic Engineering; Jim Marx, Zoning Enforcement; and Tracy Jones and Mike Sanner, Department of Law. Staff members in attendance were Jimmy Emmons, Bill Saltee and Denice Bullock.

II. **APPROVAL OF MINUTES** - The Chair announced that there were no minutes to consider at this time.

Swearing of Witnesses – Prior to sounding the agenda, the Chair asked all those persons present who would be speaking or offering testimony to stand, raise their right hand and be sworn. The oath was administered at this time.

III. **PUBLIC HEARING ON ZONING APPEALS**

A. **Sounding the Agenda** - In order to expedite completion of agenda items, the Chair will sound the agenda in regard to any postponements, withdrawals, and items requiring no discussion.

1. **Postponement or Withdrawal of any Scheduled Business Item** - The Chair asked if there was any person having an appeal or other business before the Board present requesting postponement or withdrawal of such at this time.

Staff Comment - Mr. Emmons said that the staff had not received any request for postponement or withdrawal from an appellant.

2. **No Discussion Items** - The Chairman asked if there were any other agenda items where no discussion is needed...that is, (a) The staff has recommended approval of the appeal and related plan(s), (b) The appellant concurs with the staff's recommendations. Appellant waives oral presentation, but may submit written evidence for the record, (c) No one present objects to the Board acting on the matter at this time without further discussion. For any such item, the Board will proceed to take action.

**ABBREVIATED HEARINGS**

1. **V-2013-31: MICHAEL D. CHILDERS** - appeals for a variance to reduce the required side yard from 8 feet to 2.1 feet in order to construct a detached garage in a Single Family Residential (R-1C) zone, at 435 Henry Clay Boulevard (Council District 5).

The Staff Recommends: Approval, for the following reasons:

- a. Reducing the required side yard from 8' to 2', allowing a new detached garage to be constructed (where depicted on the site plan), should not adversely affect the public health, safety, or welfare, nor alter the character of the area. Several properties on this street currently have detached garages that are closer than 8' to the side lot line.
- b. The unique situations that exist for this property are that this subdivision was developed in the 1920s & 1930s before the current Zoning Ordinance requirements. The existing detached garage currently encroaches into the side yard by about 2.5 feet, and the new garage will be in the same location, but about 3.5 feet wider. Granting the requested waiver will actually increase compatibility with surrounding properties.
- c. The detached garage is in an area with an average 12.25' wide side yard; and, in no circumstance, will the proposed side yard be less than 2'. Furthermore, because the averaged side yard is greater than the actual requirement, there will be no resulting circumvention of the Zoning Ordinance.
- d. Strict application of the Zoning Ordinance would result in a garage which will be more out of character for the neighborhood and would disallow the added garage space that is needed by the property owner(s) to access their vehicle.
- e. There is not a willful violation or other attempt to circumvent the requirements of the Zoning Ordinance by the appellant, as a building permit has been applied for and construction of the improvements has not yet begun.

This recommendation of approval is made subject to the following condition:

1. A building permit shall be obtained from the Division of Building Inspection, as depicted in the submitted application and site plan, prior to construction.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response from the audience.

Representation – Michael D. Childers, appellant, was present and he indicated that he had reviewed the recommended condition and would abide by it.

Board Comment – The Chair asked if anyone wished to discuss this request. Since there were no questions or comments from the Board or audience, the Chair called for a motion.

Action – A motion was made by Ms. Moore, seconded by Mr. Glover, and carried unanimously (Meyer absent) to approve **V-2013-31: MICHAEL D. CHILDERS** – an appeal for a variance to reduce the required side yard from 8 feet to 2.1 feet in order to construct a detached garage in a Single Family Residential (R-1C) zone, at 435 Henry Clay Boulevard, for the reasons recommended by the staff and subject to the condition recommended by the staff.

2. **V-2013-37: ANNA DEER THAKUR** - appeals for variances to: 1) reduce the required front yard from 20 feet to 8.4 feet; and 2) reduce the required side yards on each side of the property from 4.1 feet to 3 feet in order to replace a single family residence with a larger residence in a Single Family Residential (R-1E) zone within the defined Infill & Redevelopment Area, at 146 Colfax Street (Council District 3).

The Staff Recommends: **Approval**, for the following reasons:

- a. Granting the requested variances will not adversely affect the public health, safety or welfare, nor will they alter the character of the general vicinity. The lot currently has a similar, yet slightly smaller, non-conforming residential structure on it. Other small residential properties with similar homes exist in the Pralltown neighborhood.
- b. Granting the variances will not allow an unreasonable circumvention of the requirements of the Zoning Ordinance. The request is reasonable based on the small size and limited design options available for the extremely narrow subject lot.
- c. The circumstance that justifies the requested variance is that the property is unusually small, with an existing non-conforming structure at the requested setbacks.
- d. Strict application of the Zoning Ordinance would require that a smaller house be built on this property, set back in a way that is out of the ordinary for this neighborhood.
- e. This variance is not the result of an action by the appellant, as no construction has begun for this property improvement, as has no demolition of the existing structure.

This recommendation of approval is made subject to the following conditions:

1. The single family dwelling shall be constructed in accordance with the submitted application and site plan.
2. All necessary permits, including a demolition permit and building permit, shall be obtained from the Division Building Inspection prior to construction

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response from the audience.

Representation – Anna Deer Thakur, appellant, was present and she indicated that she had reviewed the recommended conditions and would abide by them.

Board Comment – The Chair asked if anyone wished to discuss this request. Since there were no questions or comments from the Board or the audience, the Chair called for a motion.

Action – A motion was made by Mr. Griggs, seconded by Mr. Glover, and carried unanimously (Meyer absent) to approve **V-2013-37: ANNA DEER THAKUR** – an appeal for variances to: 1) reduce the required front yard from 20 feet to 8.4 feet; and 2) reduce the required side yards on each side of the property from 4.1 feet to 3 feet in order to replace a single family residence with a larger residence in a Single Family Residential (R-1E) zone within the defined Infill & Redevelopment Area, at 146 Colfax Street, for the reasons recommended by the staff and subject to the conditions recommended by the staff.

3. **V-2013-38: LEXINGTON HABITAT FOR HUMANITY** - appeals for a variance to reduce the required front yard from 20 feet to 0 feet in order to allow parking in the front yard in a Planned Neighborhood Residential (R-3) zone, at 631 Breckenridge Street (Council District 1).

The Staff Recommends: **Approval**, for the following reasons:

- a. Granting the requested variance will not adversely affect the subject or surrounding properties; nor will it affect the public health, safety, or welfare. It will not alter the character of the vicinity or cause a nuisance to the public, since there is no single established pattern for providing required parking spaces in this neighborhood.
- b. Granting this variance will not allow an unreasonable circumvention of the Zoning Ordinance; and it will allow for a reasonable accommodation for a handicapped individual and his/her family, improving their safety by moving the parking space off the street and into the driveway.
- c. The special circumstance that applies to this case is that Breckenridge Street has an unusually wide right-of-way for a local residential street; and, as a result, homes that are set back 20' from the right-of-way are actually about 40' from the curb of the street.

- d. Strict adherence to the Zoning Ordinance would necessitate the removal of the temporary construction driveway, which, in this case, would result in a hardship on the handicapped individual and family members planning to reside in this new residence.
- e. The requested variance is not the result of a willful violation of the Zoning Ordinance. The applicant was unaware of which family would be the owner of this home prior to construction. This home was permitted to utilize the on-street parking provision of Article 16 of the Zoning Ordinance; and because the structure is being built with only 7' and 6.5' side yards, there is no longer room to provide a parking space behind the required front building line.

This recommendation of approval is made subject to the following conditions:

- 1. That all applicable permits be obtained from the Division of Building Inspection prior to the conversion of the temporary construction driveway to a permanent driveway.
- 2. That the permanent driveway be constructed out of a durable and dustless material, as required by Article 16 of the Zoning Ordinance.
- 3. That at no time shall a vehicle be parked in the driveway in such a way that the public sidewalk is obstructed.
- 4. That this variance only applies to the provision of the required off-street parking space and does not allow the construction of any structures otherwise not allowable by the Zoning Ordinance.
- 5. That an administrative action minor subdivision plat be submitted to, and approved by, the Division of Planning prior to the issuance of a paving permit.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response from the audience. Mr. Emmons said that the staff had received a letter in opposition and a letter in support on this variance request. He then said that the letter from Mr. Hamilton references an address of 631 Jackson Street. The staff had spoken with Mr. Hamilton at length, and he was referencing 631 Breckenridge Street in the letter.

Representation – Rachael Smith Childress and John McClelland, representing the appellant, were present. They indicated that they had reviewed the recommended conditions and would abide by them.

Board Comment – The Chair asked if anyone on the Board wished to discuss this request. Mr. Griggs asked if the person who is confined to the wheelchair is an elderly person or a child. Ms. Childress said that their client is a middle aged woman who has cerebral palsy.

Mr. Griggs then asked if the driveway could be constructed in a way that it was not permanent. Mr. McClelland said that the standards require the structure to be made of concrete. He noted that they are selling this property, and should the new homeowners want to sell it at a later time, the driveway could be removed, if needed. Mr. Griggs said that the variance stays with the property. Ms. Childress said that the terms of the mortgage can extend to 40 years, and it is very rare that a family would vacate the property earlier than that time.

Mr. Griggs asked if the driveway is required to be concrete since gravel driveways are illegal. Mr. Saltee said that that was correct, and added that a gravel driveway is only permissible in an historic district, which would then require the Board of Architectural Review approval. He then said that the Board could consider stone pavers for the driveway, but the apron would need to be made permanent.

Mr. Griggs said that he is not against this request, but he is exploring other options. Ms. Childress said that the goal is to provide a way for a wheelchair to be easily used; and anything other than a smooth surface would make that difficult, given that there are other family members. Mr. Griggs replied that that was logical and indicated that Ms. Childress was correct.

Action – A motion was made by Mr. White, seconded by Mr. Glover, and carried unanimously (Meyer absent) to approve **V-2013-38: LEXINGTON HABITAT FOR HUMANITY** – an appeals for a variance to reduce the required front yard from 20 feet to 0 feet in order to allow parking in the front yard in a Planned Neighborhood Residential (R-3) zone, at 631 Breckenridge Street, for the reasons recommended by the staff and subject to the conditions recommended by the staff.

- 4. **V-2013-39: CHURCHILL MCGEE** - appeals for a variance to reduce the required front yard from 20 feet to 10 feet in order to construct two buildings in a Neighborhood Business (B-1) zone, at 1317 & 1325 West Main Street (Council District 2).

The Staff Recommends: **Approval**, for the following reasons:

- a. Granting the requested variance will not adversely affect the subject or surrounding properties; nor will it affect the public health, safety, or welfare. It will not alter the character of the vicinity or cause a nuisance to the public, since most other properties in this strip center are located at similar setbacks from the right-of-way.
- b. Granting this variance will not allow an unreasonable circumvention of the Zoning Ordinance since the commercial buildings are all located at an average of 10 feet from the property line, but generally lie about 90-100 feet from the travel lanes of West Main Street/Leestown Road. The fact that the parking lots are located in the State right-of-way is a situation unique to this strip center.

- c. Strict adherence to the Zoning Ordinance would constitute a hardship to the appellant, as this would be the building that is required to be constructed 10 feet further back than other buildings in this center.
- d. The requested variance is not the result of a willful violation of the Zoning Ordinance, as the subject property was developed prior to the adoption of the current Zoning Ordinance, particularly Article 8-16(h), which now requires the front yard to be 20 feet in the B-1 zone.
- e. The variance is not a result of the applicant's actions, as the building has not been constructed, or started.

This recommendation of approval is made subject to the following conditions:

1. That the property be developed in accordance with the submitted site plan and application.
2. That a zoning compliance permit and a building permit be obtained from the Divisions of Planning and Building Inspection prior to construction.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response from the audience.

Representation – Sharon Woorum, appellant, was present and she indicated that she had reviewed the recommended conditions and would abide by them.

Board Comment – The Chair asked if anyone wished to discuss this request. Since there were no questions or comments from the Board or audience, the Chair called for a motion.

Action – A motion was made by Ms. White, seconded by Mr. Griggs, and carried unanimously (Meyer absent) to approve **V-2013-39: CHURCHILL McGEE** – an appeals for a variance to reduce the required front yard from 20 feet to 10 feet in order to construct two buildings in a Neighborhood Business (B-1) zone, at 1317 & 1325 West Main Street, for the reasons recommended by the staff and subject to the conditions recommended by the staff.

5. **V-2013-40: ANDERSON COMMUNITIES** - appeals for a variance to allow a wall sign to be located at 18 feet, rather than at the required minimum 50-foot height, in a Lexington Center Business (B-2B) zone, at 120 East Main Street (Council District 3).

The Staff Recommends: Approval, for the following reasons:

- a. Granting the requested variance will not adversely affect the public health, safety or welfare, nor will it alter the character of the general vicinity. The sign is otherwise an allowable sign, and granting the height variance will allow the applicant to install a sign that will be architecturally complimentary to the building, as it would orient to the Phoenix Park area of downtown.
- b. Granting the variance would not allow an unreasonable circumvention of the Zoning Ordinance since the proposed signage falls within the allowable size for this north facing wall façade, and the signage is merely being lowered due to the height and architectural character of the building.
- c. The special circumstance that justifies this variance is the multi-level parking garage that separates the first floor commercial from the residential uses at the top of the building, and its location adjacent to Phoenix Park.
- d. Strict application of the Zoning Ordinance would result in signage that which would cause potential light pollution to the residents of the dwelling units, and would not necessarily result in a more appropriate design for the signage.
- e. The circumstances surrounding this variance are not the result of a willful violation of the Zoning Ordinance, but rather a desire to install more effective and architecturally relevant signage for a circumstance that was not envisioned by the Zoning Ordinance.

This recommendation of approval is made subject to the following conditions:

1. The sign shall be installed in accordance with the submitted application, site plan, and building elevation.
2. A sign permit shall be obtained from the Division of Building Inspection prior to the installation of the sign.
3. Any further changes to the structure of the sign, if desired, shall be subject to the approval of the Courthouse Area Design Review Board.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response from the audience.

Representation – Andrew Moore, EOP Architecture, was present representing the appellant. He indicated that they had reviewed the recommended conditions and would abide by them. However, he asked for clarification to the staff's case review that references specifically the words "Park Plaza". He noted that the actual lettering or verbiage could potentially change. The Chair confirmed that the verbiage could change and asked for the staff to respond. Mr. Emmons said that the Ordinance does limit the size of the lettering, but the staff does not have any intention of requiring what words are to be used on that sign. He then said that if there are any future applications, the staff can work with the appellant on the size of the lettering, at that time. Mr. Moore said that they are agreeable to the mounting of the sign; but he wanted to clarify that there was not a restriction on wording of the sign. Mr. Saltee said that the staff had reviewed an earlier version of the sign where part of that sign did not comply with the Ordinance, but the proposed lettering does meet the size limitations of the Ordinance. He then said that the staff's concern is only the possibility of

the letters exceeding the size limitations. Mr. Griggs asked if the sign wraps around the building creating a two-face sign. Mr. Moore said that they are adding a screen to the façade as part of an architectural element and the screen itself wraps the building; but the sign is only attached to the Main Street elevation.

Board Comment – The Chair asked if anyone wished to discuss this request. Since there were no questions or comments from the Board or audience, the Chair called for a motion.

Action – A motion was made by Ms. Moore, seconded by Mr. Glover, and carried unanimously (Meyer absent) to approve **V-2013-40: ANDERSON COMMUNITIES** – an appeals for a variance to allow a wall sign to be located at 18 feet, rather than at the required minimum 50-foot height, in a Lexington Center Business (B-2B) zone, at 120 East Main Street, for the reasons recommended by the staff and subject to the conditions recommended by the staff.

6. **C-2013-36: BAKER IRON and METAL** - appeals for a conditional use permit to operate an automobile wrecking facility as part of the existing scrap metal dealership in a Heavy Industrial (I-2) zone, at 1550 - 1558 Old Frankfort Pike (Council District 2).

The Staff Recommends: **Approval**, for the following reasons:

- Granting the requested conditional use permit should not adversely affect the subject or surrounding properties. All of the immediately adjoining properties are zoned for light industrial uses, and the automobile dismantling and wrecking will be done indoors, in a building that is 850 feet away from the nearest residential property.
- All necessary public facilities and services are available and adequate.

This recommendation of approval is made subject to the following conditions:

- The automobile wrecking shall be operated in accordance with the submitted application and site plan.
- All necessary permits shall be obtained from the Division of Planning and the Division of Building Inspection prior to operation of the automobile wrecking.
- This automobile wrecking use shall include the dismantling and crushing of cars, but shall not include a car shredder or similar device without approval of an amended application by the Board of Adjustment.

Mr. Sallee informed the Board that the staff did post the required notice sign on the subject property, for this conditional use permit, two weeks prior to today's meeting.

Chairman Stumbo asked whether there were objectors to the subject appeal present. There was no response from the audience.

Representation – John Walters, attorney, was present on behalf of his client, and he indicated that they had reviewed the recommended conditions and would abide by them.

Board Comment – The Chair asked if anyone on the Board wished to discuss this request. Ms. Moore asked if notice was sent to individual property owners concerning this request. Mr. Emmons displayed the notification map to the Board members and said that, in reviewing the map, the 500-foot notification area did extend into the neighborhood across the railroad track, which is the Cardinal Valley neighborhood. He then said that, in addition to the 500-foot notification area, the staff had spoken with the Cardinal Valley Neighborhood Association representative.

Mr. Griggs asked if this facility would be selling parts or if the vehicles would be scrapped. Mr. Walters said that the liquids from the vehicles would be removed and the vehicles would be crushed for pick up and recycled. This facility would not be selling vehicle parts.

Action – A motion was made by Mr. Glover, seconded by Ms. White, and carried unanimously (Meyer absent) to approve **C-2013-36: BAKER IRON and METAL** – an appeals for a conditional use permit to operate an automobile wrecking facility as part of the existing scrap metal dealership in a Heavy Industrial (I-2) zone, at 1550 - 1558 Old Frankfort Pike, for the reasons recommended by the staff and subject to the conditions recommended by the staff.

- B. Transcript or Witnesses** - The Chair will announce that any applicant or objector to any appeal before the Board is entitled to have a transcript of the meeting prepared at his expense and to have witnesses sworn.
- C. Variance Appeals** - As required by KRS 100.243, in the consideration of variance appeals before the granting or denying of any variance the Board must find:

That the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the Board shall consider whether:

- The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;

- (b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and
- (c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The Board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulations from which relief is sought.

There were none remaining.

**D. Conditional Use Appeals** – There were none remaining.

**E. Administrative Review** – There were none remaining.

#### **IV. BOARD ITEMS**

**A. REQUEST FOR CLOSED SESSION** – The Chair said that the Department of Law had requested that the Board of Adjustment go into closed session to discuss two matters of pending litigation.

Action – A motion was made by Mr. Glover, seconded by Ms. White, and carried unanimously (Meyer absent) to enter closed session to discuss two matters of pending litigation.

*The Chair declared a closed session at 1:48 p.m. He reconvened the meeting in open session at 2:41 p.m.*

Action – A motion was made by Mr. Glover to direct the Division of Planning to not accept the conditional use application for property located at 8291 Old Richmond Road and direct the Department of Law to not agree to any advance of the existing 2012 Board of Adjustment decision appeal in the Fayette County Circuit Court for the following reason:

1. The application largely involves the same issues, use and the same real property.

The motion was seconded by Mr. Griggs, and carried unanimously (Meyer absent).

**B. REQUEST FOR RECOMMENDATIONS FROM THE DEPARTMENT OF LAW AND DIVISION OF PLANNING** – On 5/31/13, by consensus, the Board requested that the Department of Law and Division of Planning make recommendations regarding the Board's rights of action concerning enforcement of the Notice of Violation issued March 8, 2013, on property located at 8291 Old Richmond Road.

Legal Comments – Tracy Jones, Department of Law, said that, during the May meeting, the Board had asked the staff to gather information on potential enforcement regarding the Notice of Violation for property located at 8291 Old Richmond Road. She directed the Board's attention to the Notice of Violation letter, dated March 8, 2012, and said that this notice was sent for the Boone Creek Properties, LLC, which is located at 8291 Old Richmond Road.

Ms. Jones said that, in response to multiple violations, Mr. King sent a Notice of Violation to Boone Creek Properties, LLC, who is now appealing that action, citing that the staff did not interpret the Zoning Ordinance properly. She then said that there was a full hearing at the May meeting. It was the Board's decision to deny the appellant's appeal, and the Board had found that the Notice of Violation did properly interpret the Zoning Ordinance. It was at that time that the Board had requested the staff to make a presentation on potential enforcement of this violation.

Ms. Jones said that the staff has provided a copy of the Zoning Ordinance and the Kentucky Revised Statutes pertaining to what enforcement actions are allowed. This will then allow the Board to be able to make an informative decision, as to which direction to proceed. She then said that Zoning Enforcement is a new concept in the Division of Planning, and this case is unusual and different from any other cases that the enforcement team has been faced with in the past. She directed the Board's attention to Section 5-9(c) of the Zoning Ordinance (Civil Penalties), and said that civil penalties can be issued, at any time, from the government once the violation has been established. These penalties are in the form of fines, and the amount of that fine is based upon the number of times the Notice of Violation has been sent to that property during a 12-month period. She then said that a party who is fined under this section, due to a Notice of Violation that is not remedied, can in fact appeal that fine to the Infrastructure Hearing Board, should they feel it was not appropriate. Ms. Jones said that if the Board's goal is compliance, this may not be the most effective means, but it could be initiated by the government.

Ms. Jones said that, at the May meeting, a Board member had raised the issue of abatement, and the possibility of the government resolving the potential violation. The staff does not recommend abatement and does not believe it to be appropriate. She directed the Board's attention to Section 5-9(d) of the Zoning Ordinance (Abatement), and said that "*When there is reason to believe that the violation poses a serious threat to public health, safety or welfare; or in situations where continuation of the violation would be irreparable or irreversible, the government may, without further notice, proceed to abate the conditions....*" Ms. Jones said that the staff has not heard anything to lead them to believe that there is valid evidence of a serious threat, only people's opinions; therefore, the staff does not recommend the Board going in this direction.

Ms. Jones said that, as far as prosecution of the property owner, the city does not have prosecutors on the staff, and this would not be in the purview of the Lexington-Fayette Urban County Government. However, the city does have an option to forward this complaint over to the Fayette County Attorney's Office. She said that, when there is a code violation, the city can forward those requests to the Fayette County Attorney's Office, who will review the complaint and determine if that complaint would be appropriate under the misdemeanor statute for the Fayette District Court. She added that the staff had spoken with the Fayette County Attorney's Office, and they have indicated that they would explore this issue; but they were concerned due to the other matters that are related to this property and the context of the Notice of Violation, which are currently on appeal in the Fayette Circuit Court. She added that the Fayette County Attorney's Office was somewhat concerned with pursuing criminal action, but they did not say they would not. She said that very often a normal course of action would be for the District Judge to refer this type of complaint over to mediation.

Ms. Jones directed the Board's attention to KRS 100.237 (conditional use permits), and said that the Board can seek an injunction, with the Fayette County Circuit Court, requesting the Court to enforce this violation in order for the property to become compliant. She then said that there was some thought from the Board on whether or not the Board could direct the legal staff to proceed in this manner. The Board can do so; however, KRS 100.237(1) states that the *"Board has a right of action"*, but this section does not explain what that "right of action" is and how it is allowed to proceed. She directed the Board to KRS 100.337 (Enforcement by Commission) and said that this section states that *"the Commission shall have a cause of action for all appropriate relief, including injunctions..."* Mr. Glover said that this is specific to the Planning Commission. Ms. Jones replied affirmatively, and said that the staff's concern is that KRS 100.237 does not specifically say the Board of Adjustment, whereas KRS 100.337 does specifically say the Planning Commission. She then said that the Board of Adjustment may need the Planning Commission's blessing to proceed forward with this type of action in order to address the violation of the Zoning Ordinance or anything within this Chapter. She added that without the staff knowing what action the Board might proceed with, the staff presented and explained the information to the Planning Commission on June 27<sup>th</sup>. She said that, at that meeting, the Planning Commission did authorize the Board of Adjustment to proceed forward and they believed this to be the appropriate action. Ms. Jones said that, should the Board seek an injunction, the staff would file this violation with the Fayette County Attorney's Office, which would result in a hearing; and, at that time, a Judge would then issue what orders he or she deemed appropriate. She then said that the standards to seek an injunction are typically high; for example, irreparable harm. She added that since there is already a Notice of Violation being upheld by this Board, and if the Board chooses to do so, the injunction for the new violation could proceed forward.

Ms. Jones said that another option for the Board is the revocation of a conditional use permit. She directed the Board to Section 7-6(a)(6) (Conditional Use Permits) of the Zoning Ordinance, and said that this section states that *"If the landowner is not complying with all of the conditions listed on the conditional use permit, the Division of Planning shall report the fact in writing to the Chairman of the Board of Adjustment. The Board shall hold a hearing on the report within a reasonable time, and notice of the time and place of the hearings shall be furnished to the landowner at least one (1) week prior to the hearing. If the Board of Adjustment finds that the facts alleged in the report of the Division of Planning are true and that the landowner has taken no steps to comply with them between the date of the report and the date of the hearing, the Board of Adjustment may authorize the Division of Planning to revoke the conditional use permit and take the necessary legal action to cause the termination of the activity on the land which the conditional use permit authorizes."* She said that this type of action is not necessary for every violation; but the Board does have this option. She added that there is an existing violation on this property, and notice of that violation was mailed to and received by the appellant. She said that, should the Board choose to move forward, a hearing specifically regarding the revocation of the conditional use permit would need to be scheduled. She then said that the same requirements would apply to that meeting as would any other meeting, such as notices to be mailed out, legal advertisements and so forth. She added that the Board would need to make their recommendation at that hearing after all the evidence is presented. She reaffirmed that the Board can not make a decision on revoking a conditional use permit without holding a public hearing. Mr. King said that it should be noted that the revocation is a different issue than a violation. Ms. Jones said that enforcing a violation, and whether or not the Board schedules a revocation, is not the same thing. She then said that once notice of a violation is submitted, the Board does have the authority to make a decision as to whether or not the Board wants to proceed with a revocation hearing. She added that the staff is not saying that this type of course is a remedy or an enforcement action. Ms. Jones noted that this has not been the course for an enforcement action in the past, and it certainly can't go forward without the criteria that are set forth in the Zoning Ordinance. In conclusion, Ms. Jones said that now that the Board has been informed of this violation, if they choose to proceed, it would require a separate hearing.

Note: Ms. Moore departed the meeting at this time.

Board Questions – The Chair said that the Board's options include the Fayette County Attorney's Office imposing fines, requesting the legal staff to pursue the injunction, or scheduling a revocation hearing for the July hearing. Ms. Jones said that the Board has three options, which includes fines, referring this violation to the Fayette County Attorney's Office and seeking an injunction in terms of enforcement. She added that the revocation hearing is a separate issue, and added that Section 7-6(a)(6) requires the Board to be notified of the violation, which has already occurred. She said that there was some confusion at the last Board of Adjustment meeting that once a violation was upheld there could be a revocation, and the staff was asked to make sure that the Board was aware that the process did not work in that manner.

Mr. Glover said that any of the fines that are imposed can be appealed to an Infrastructure Hearing Board. Mr. King said that a civil citation is the newest tool for enforcement, and it allows for a fairly expedited rate versus being tied up in the court system to levee fines, issue citations and have those fines paid by the appellant. He then said that this is type of tool is more effective on a smaller scale, such as single family residential properties, who may be required to pay a \$75.00 fine for the first violation. He added that the staff has had fairly good luck on these types of violations; and the appellant knows that if they keep repeating that same violation, the amount of the fines will become more aggressive. He said that, in the past, the staff has had cases where the appellant had two different citations and continued to repeat those violations resulting in the staff taking action through the Courts. Mr. King said that, for this case, the staff is looking for compliance; and he does not believe that increasing the fines would likely be effective with attaining compliance of the Notice of Violation. Mr. Glover agreed.

Mr. Glover then said that the staff had spoken on abatement and the Board would need to apply to the Fayette County Attorney's Office, requesting their office to enforce this order. He then asked if this would be a civil or criminal process. Ms. Jones said that that course of action is not an option the staff is recommending. The staff wanted the Board to be aware of that information since there was some confusion at the last meeting. Mr. Glover noted that he was not present for that meeting. Ms. Jones said that there was some discussion at the end of the May hearing that raised a lot of questions, so the staff wants to be sure that the Board is informed of this information at today's hearing. She said that abatement is only used when there is a serious threat to the public health, safety and welfare. She added that the city would need to hire someone to physically take down what they believe to be in violation and then charge the cost back to the appellant. Ms. Jones said that the Fayette County Attorney's Office is a separate option that the Board can take, adding that this course of action is in the form of prosecution by the Fayette County Attorney's Office in the Criminal District Court under code violations. The Fayette County Attorney's Office is a separate course of action than abatement.

Mr. Glover asked what the abatement process is. Ms. Jones said that the legal staff would submit the information to the Fayette County Attorney's Office, who would then determine the violation as a complaint. That office would then proceed with prosecution. Mr. Glover then asked if this would be under the criminal statutes. Ms. Jones replied affirmatively, adding that this would be a violation of the codes. She said that KRS 100.991 gives the Fayette County Attorney's Office the authority to proceed.

Mr. Griggs said that even though the staff is not making a recommendation on what the Board should do, the staff does discourage the Board from taking certain avenues. Ms. Jones said that the staff reviewed the draft minutes, as well as listened to the audio of the May meeting, to be sure of what the Board was requesting. It was the staff's understanding that the Board wanted a staff report showing what options the Board had, pertaining to enforcement. She said that the staff is not making a specific recommendation, and the decision is up to the Board. The staff wanted the Board to have all the information as well as the staff's experience, before making their recommendation.

Mr. Griggs asked for an explanation to the process of the injunction and the role of the Planning Commission assisting the Board of Adjustment. Ms. Jones said that when there are two statutes that speak to "rights of action" or any other particular issue, the statute that is more specific, such as KRS 100.337, overrides the less specific statute. She then said that the staff was unsure if the Board could proceed without (more or less) the Planning Commission's blessing. Mr. Griggs then asked, once that is established, how an injunction stops the illegal activity. Ms. Jones said that an injunction provides an order from the Fayette County Circuit Court, stating that that activity must be stopped. She then said that if that order is not followed; the defendant is subject to a contempt of court charge. Mr. Griggs said that that sounds serious. Ms. Jones replied that it can be.

Mr. Griggs said that revocations are a separate issue from enforcement. Ms. Jones replied affirmatively, and said that revocations require a public hearing, and there is nothing that the Board can do today other than schedule that hearing. Mr. Griggs said that the staff had requested the Board to schedule the revocation for Con Robinson's mining operation on Georgetown Street, because he was so blatantly in violation of the conditional use permit for composting. He said that considering that the appellant has been out of compliance for over a month with the fishing camp use, he asked what the difference is between the Con Robinson case and the Boone Creek Properties case. Mr. Glover said that in order to seek an injunction, the Board of Adjustment would need to show irreparable harm, which is the difference between the Con Robinson case and the Boone Creek Properties case. Ms. Jones said that before an injunction can occur and before an order can be issued to stop that violation, the staff must show the presiding judge that there is irreparable harm. She then said that there is an existing violation that has been upheld by the Board of Adjustment, and the staff is not saying that the Board can not proceed; but the legal standards must be met first in a court if an injunction is to be sought.

Mr. Glover said that the Board's denial of the appeal is in the courts, and asked if the Board can hold everything in abeyance pending the outcome of the Fayette County Circuit Court's, rulings. Ms. Jones replied affirmatively. Mr. Glover then said that the Board had previously taken a motion directing the Division of Planning to not accept the conditional use application for property located at 8291 Old Richmond Road and direct the Department of Law to not agree to any abeyance of the existing 2012 Board of Adjustment decision appeal in the Fayette County Circuit Court. Ms. Jones replied affirmatively, noting that that was for that case and that is certainly an option for the 2000 case. Mr. King said that the staff had issued a Notice of Violation and the Board upheld that decision. He noted that the litigation would keep the staff from trying to pursue compliance for that Notice of Violation. He said that the staff would hope to seek to enforce that notice by having the appellant come into compliance while the issue was being litigated, rather than have the activity go on potentially for years while the litigation works its way through the



courts. Mr. Glover said that the Board held everything in advance with the Community Inn case, pending the outcome of the courts. He then said that he is trying to understand the law equally and apply it evenly. Ms. Jones said that the Community Inn situation is similar and it was initially held in abeyance, but because they had indicated that they were trying to relocate and needed additional time, and the staff was in agreement. She then said that that court action is proceeding, and the reason it is currently in abeyance is due to the judge's order. Mr. Glover said that the Board had agreed to not accept the amended application from Boone Creek Properties and allow the legal process to continue. He asked if that would be the appropriate forum now that the Fayette County Attorney's Office has jurisdiction. Ms. Jones said that the question is whether or not the Board wants to try to achieve compliance and enforce the violation on a parallel track of that decision going forward. Mr. King said that the difference with the Community Inn is that the judge told the staff not to force the people out on the street. He then said that, while the Community Inn case is being litigated, their operations could shut down while the courts determine whether or not that use was appropriate. This could also happen with Boone Creek Properties, and the staff would prefer that the zip line not be operational. The staff would prefer that Boone Creek Properties not violate the Zoning Ordinance, which the staff had found and the Board supported. Mr. Glover said now that decision is out of the Board's hands and has been placed in the Circuit Court, which now has jurisdiction of whether or not the appeal was appropriately denied by the Board of Adjustment. He said that both the BOA and the court can not have the same jurisdiction on the same issues. He added that since the court already has an ongoing case, the Board should not step on the court's toes since the court can enter into a temporary injunction. Ms. Jones said that the court only has jurisdiction on the ongoing case for the appeal of the 2012 decision on the conditional use permit. She then said that the standards that the court will be applying are whether or not the Board's decision in denying that request was arbitrary. She added that the courts does not have any information regarding the current Notice of Violation because this was issued by Mr. King, in regard to the violation of an existing conditional use permit to allow a fishing club, that was granted by the Board of Adjustment in 2000. The staff presented that information on the Notice of Violation to the Board at the May meeting. Ms. Jones indicated that she was just informed that an appeal has been filed with the court for the Notice of Violation for the 2000 conditional use permit.

Mr. Griggs said that, given the evidence presented for the fishing club violation, he asked why the Board is not considering a hearing to revoke the 2000 conditional use permit. Mr. Marx said that there are major differences between the Con Robinson case, the Boone Creek Property's case and the Community Inn case. Mr. Griggs asked for history on the Boone Creek Properties and that property's compliance. Mr. Marx said that the staff did not receive one single complaint for the Boone Creek Property until February of this year. He then said that there were a lot of allegations of the property being noncompliant, but the only thing that has been documented is the Notice of Violation that was issued by Mr. King. He added that the reason the staff is not more aggressive in seeking the revocation is due to the lack of documentation. He said that the Con Robinson case and the Community Inn case were well documented in terms of the adverse impacts to the surrounding properties. He then said that with the Community Inn case there were groups of people who were blocking the sidewalks and trespassing; and, on occasion the Police Department was called for public intoxication and physical damage to the adjoining properties. The Community Inn was very well documented in terms of adverse impact to the immediate area. Mr. Marx said that the Con Robinson case was also very well documented on its adverse impact to the surrounding properties. He then said that an adjoining property had damage to the foundation of the house from the blasting on the Robinson property. He added that there was documentation of respiratory illnesses and the landscaping dying out from the dust of the rock quarry operations. As for the Boone Creek properties, may be the documentation has not come out yet; but the initial 40-page complaint and the numerous editorials in the newspaper and subsequent communications, partly because it was not the legalistic approach, but there has been hardly anything documented saying how the zip line and the canopy tours have adversely impacted the environment or the surrounding properties or their owners. This is why the staff was reluctant in handling the Boone Creek case in the same manner as the Community Inn case and the Con Robinson case, in terms of a possible revocation.

The Chair said that the staff has made it clear as to what options the Board has in handling the Boone Creek Properties, LLC Notice of Violation. He then said that, in his personal opinion, he would like to endorse and embrace the Planning Commission's recommendation in pursuing an injunction and have the activity on this property cease and desist. He added that he understands that there are other issues pertaining to this case that are allowable in other areas, but he would like to move forward and authorize the Law Department to seek an injunction on Boone Creek Properties, LLC. The Chair said that an injunction would be the clearest, cleanest and fairest option to take since this is a very complex issue from a legal standpoint. He then said that a revocation hearing is a separate issue and he suggested authorizing the Law Department to move forward with the injunction. The Chair noted that the Board would need to make a motion. Mr. Griggs said that with the options the staff has presented, that seems to be the most logical enforcement route; although, with the standard being so high and if it fails, he asked how the Board stops this activity. He said that there should be some way to meet success. The Chair said that, as the staff has explained, the courts are rendering this decision, and the Board would have to have faith in the system. He then said that with what has been presented to the Board and the actions that have been taken, he would hope that the courts would look upon this case favorably. He added that, once this case is forwarded to the courts, it is out of the Board's hands.

Action – A motion was made by Mr. Griggs, seconded by Mr. Smith, to obtain some enforcement results for Boone Creek Properties, LLC via the authorizing the Law Department to move forward with an injunction.

Discussion of Motion – Mr. Glover said that he is not sure if the Board has all the information needed to move forward with a motion. He then said that the representing counsel for Boones Creek Properties, LLC has stated that they have filed an appeal of the Board's decision on the Notice of Violation from the May meeting. He then said that the Board can hold this decision in abeyance pending the resolution of the first appeal. He added that if the Circuit Court has jurisdiction of this case, and the Board

keeps piling on order after order, he believes that the Board should allow the legal process to work as they are in the Circuit Court. Mr. Glover said that he believes the motion on the floor is premature.

The motion carried 4-1 (Glover opposed; Meyer and Moore absent).

- C. **BOARD COMMENTS** – Mr. Griggs said that, at the May meeting, he was bothered by the testimony given about the ongoing violations on the Boone Creek Properties, regarding the fishing camp permit. He then said that he would like the staff to establish, to their satisfaction, the ongoing violations; and if February is the first notification of a violation, then he would like the staff to accumulate additional information on any other violations, other than the zip line, such as motel use of the 5-bedroom house, conventions and so forth, that are outside of the 2000 conditional use permit to be placed into evidence. If the Boone Creek Properties continues those uses indefinitely, then the Board would have just cause to revoke the conditional use permit. Mr. King said that such evidence can only be “second-hand.” He then said that the information that was reported to the staff, in the initial complaint, alleged a number of issues occurring over time; but the Zoning Enforcement staff had no first-hand visibility of those issues. He said that the staff is not disputing the alleged issues, but it was not seen by the Enforcement staff. He then said that during an on-site investigation, the staff did observe the zip line construction, and asked the property owner to cease, but he ignored that request. The staff then issued the Notice of Violation, and Boone Creek Properties appealed to the BOA, who then upheld that decision. Mr. King said that that is the only violation that has been documented.

Mr. Griggs said that there is evidence of Boone Creek Properties advertising on social media, and they are stating that this property is a social club. Mr. King said that that information was provided by third party, and the staff will try to compile such evidence; but to trace 10 years of history on this property may be impossible since that was before the Division of Planning handled enforcement.

Mr. Griggs said that there are activities that are outside of the permitted conditional use. Mr. King said that he understands that, and he is not making excuses; but the Board must understand that there is a limited available staff. He then said that the staff can not be on site 24 hours a day, 7 days a week to see what activities are being done. He then said that the staff has done their best and has made site visits during the evening hours and on the weekends. The staff would gladly compile the information and report their observations, and asked if the Board is asking for evidence to be brought and a hearing advertised to consider that information in a hearing. Mr. Griggs said that paragraph 6 of the Zoning Ordinance describes the Board of Adjustment’s responsibility when evidence is brought forward when a conditional use permit is not in compliance. He then said that it is the responsibility of the Board to review that evidence and whether or not that permit can be brought into compliance or have the conditional use permit revoked. Mr. Griggs said that that is what he wants to do with the staff’s assistance.

- V. **STAFF ITEMS** - The Chair said that if there were any items a Staff member wishes to present, they would be heard at this time. Mr. Sallee responded that there were none, at this time.

- VI. **NEXT MEETING DATE** - The Chair informed the Board Members that the next meeting date will be July 26, 2013.

- VII. **ADJOURNMENT** - Since there was no further business, the Chair declared the meeting adjourned at 3:28 p.m.

---

Barry Stumbo, Chair

---

James Griggs, Secretary